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Freedom of contract, bargaining power & forum selection in bills of lading

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Propositions Regarding the Doctoral Thesis

“Freedom of Contract, Bargaining Power and Forum Selection in Bills of Lading”

by Juan Alberto Salmerón Henríquez

1. Freedom of contract and party autonomy (“l'autonomie de la volonté”) rest at the center of our free market economy, and are an essential element of our human liberty. Private individual are, in principle, the best arbiters to determine the extent and content of their obligations.
2. In certain exceptional occasions, and despite the importance of the freedom of contract principle, it is necessary for the legal system and the courts to limit the abilities of the parties in regards to the content of their agreements, in order to prevent abusive practices.
3. Contracts of adhesion, coupled with the almost universal reliance on fine print, represent an inherently risky contractual tool. As they are often the result of markedly uneven situations in the bargaining power of each party, they are a fertile ground for abusive contracts in which one party is able to impose his will on the other (in the words of Lord DENNING in the Bundy decision, “push the weak to the wall”).
4. Forum selection clauses are often buried in the fine print of adhesion contracts, and must be accepted by those willing to contract. While these clauses certainly fulfill an important role in commerce, enforcing them in non-negotiated contracts between parties of significantly different bargaining power jeopardizes access to justice and the right of aggrieved parties to obtain relief.
5. Contracts of carriage by sea under bills of lading have, historically, been the result of contractual relations between parties of unequal bargaining power, with carriers and shipowners appearing as powerful, and cargo interests as weak. The abusive practices that arose as a result of this imbalance led to the adoption of different international regulations of the trade, aiming to restore a semblance of balance in the contractual bond.
6. The regulatory systems that are in place (or which, like the Rotterdam Rules, wish to come into force) have often proven to be insufficient to fulfill the goal of restoring balance. This is particularly evident in the case of forum selection clauses which, despite often representing a lessening of the liability of the carrier (what the regulations specifically were designed to prevent), are regularly enforced, to the detriment of the cargo interests.
7. As tempting as new regulations might appear, the solution to this problem should not rely on drafting new rules. There are too many competing standards as it is, and adding one more into the mix will not help the situation. Instead, there should be a shift in the way in which the existing regulations are interpreted (particularly the Hague (Visby) Rules, the most common), recognizing that forum selection clauses can have as an unintended (and sometimes intended) result to damage the adhering party to the contract.
8. Thomas Payne was right when he said: “I have always strenuously supported the right of every man to his own opinion, however different that opinion might be to mine. He who denies to another this right, makes a slave of himself to his present opinion, because he precludes himself the right of changing it.”